



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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Memorandum

Date: January 20, 2023

To: Richard Conescu, Chair, & Members, Zoning Board of Adjustment

From: Robert Price, Planning & Zoning Administrator

Subject: **Governor's Hill Corp (petitioner/owner)** - Variance under Section 3.06 of the Zoning Ordinance to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-02.

The following information is provided to aid in your consideration of the above referenced case. Additional background and application materials are included in your packet.

Background & Project Description

Map 6D, Lot 104 is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. The lot is approximately 0.637 acres and is serviced by municipal water (MVD) and a private septic system. The lot is surrounded by residential uses and also abuts Reeds Ferry Elementary School.

The petitioner seeks a variance to allow an existing retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required. Staff notes that the 2021 Zoning Ordinance defines the term **Structure** as follows:

57. Structure: Anything constructed or erected, the use of which demands its permanent location on the land, or anything attached to something permanently located on the land.

In the Town of Merrimack, anything meeting the definition of a structure is subject to building permit requirements. Staff also notes that the 2018 International Building Code exempts retaining walls that are less than 4 feet in height from needing a building permit.

In this particular case, the subject retaining wall is, at its tallest point shown on the certified plot plan, 18.3 feet in height. This particular section of the wall happens to also be located within the building setback. Since the wall exceeds 4 feet in height within the setback area, it is considered a structure not only by the Town's Zoning Ordinance, but also by the 2018 International Building Code and is both subject to a building permit and building setbacks, necessitating the variance.

Standard of Review

It is the burden of the petitioner to demonstrate that the five criteria for the granting of the Variance under Section 3.06 of the Zoning Ordinance to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required, are met.

As a reminder, for a variance to be legally granted the petitioner must demonstrate that **all five** of the statutory criteria for granting a variance have been met. The statutory criteria, and an explanation of what each criterion is seeking to establish/what the petitioner must prove as part of their response, as prepared by the New Hampshire Office of Planning & Development, is located on the last page of this memo.

Staff Guidance on Potential Motions

Staff cannot make specific recommendations for action to the Zoning Board of Adjustment due to the Board's status as a quasi-judicial body. However, staff suggests the Board use one of the following templates for a motion to grant or deny the variance, depending whichever course of action the Board deems appropriate:

Potential Motion to GRANT the Variance:

"I make a motion that the Board finds the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the Variance under Section 3.06 of the Zoning Ordinance to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required."

Potential Motion to DENY the Variance:

"I make a motion to deny the Variance under Section 3.06 of the Zoning Ordinance to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required, for the following reasons:

- (List the specific reasons why the Board felt the petition failed to meet all five statutory criteria, not just the criteria the Board felt were not met)"***

Ec: Governor's Hill Corp., petitioner
Eli Leino, Bernstein Shur
Building Department Staff
Fire Prevention Staff
Assessing Department Staff
Merrimack Village Water District
Cc: Zoning Board File

VARIANCE CRITERIA GUIDELINES

Statutory Requirements (RSA 674:33, I(b)) <i>PETITIONER MUST SATISFY <u>ALL</u> OF THE FOLLOWING</i>	Explanation
1. The variance is not contrary to the public interest.	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure “public rights.”
2. The spirit of the ordinance is observed.	As it is in the public’s interest to uphold the spirit of the ordinance, these two criteria are related.
3. Substantial justice is done.	The benefit to the petitioner should not be outweighed by harm to the general public.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The Board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship can be shown in either of two ways: First is to show that because of special conditions of the property that distinguish it from other properties in the area: (a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (b) The proposed use is a reasonable one. <u>Alternatively</u> , unnecessary hardship exists if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.	The petitioner must establish that the property is burdened by the zoning restriction in a manner that is distinct from other land in the area. (a) Determine the purpose of the zoning restriction in question. The petitioner must establish that, because of the special conditions of the property, the restriction, as applied to the property, does not serve that purpose in a “fair and substantial” way. (b) The petitioner must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood. <u>Alternatively</u> , the petitioner can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.

Source: NH Office of Planning & Development Zoning Board Handbook, 2021 edition